## APPENDIX

Filed Oct. 11, 1956

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 3-55

UNITED STATES OF AMERICA

v.

DORSEY K. OFFUTT

**Memorandum by the Court**

WILKIN, District Judge (By Designation):

This cause has had an extended history in the courts. It originated in the trial of the case of *United States* v. *Peckham*, Criminal No. 579-52 in this Court. At the conclusion of that trial, the presiding judge cited the defendant here, Offutt, who had served as trial counsel for Peckham, for contempt of court, and filed twelve separate charges based on Offutt's conduct during the trial. The Court found the respondent guilty of all the charges, and ordered him committed for ten days to the custody of the United States Marshal.

The Court of Appeals affirmed the trial judge as to four of the twelve findings of contempt and reduced the punishment to commitment for a period of 48 hours. *Offutt* v. *United States*, 93 U.S. App. D.C. 148, 208 F. 2d 842 (1953). On appeal, the Supreme Court, under the authority of *Cooke* v. *United States*, 267 U.S. 517 (1925), and in the exercise of the Court's supervisory authority over the administration of criminal justice in the federal courts; held that the charges should be tried before a judge other than the one before whom the contempt was alleged to have originally arisen. *Offutt* v. *United States*, 348 U.S. 11 (1954).

In compliance with that decision, the United States Attorney filed in this court an application for an order to the defendant herein to show cause why he should not be adjudged in criminal contempt. In *Re Dorsey K. Offutt*, Miscellaneous No. 3-55. Subsequently, a hearing was held before another judge, in accordance with the mandate of the United States Supreme Court, on the charges contained in the order to show cause (which were identical with the charges which had previously been affirmed by the Court of Appeals). Respondent was then found guilty on two of the four charges.

The case was again appealed. It should be noted that while on appeal, the United States was made a party plaintiff by order of the Court of Appeals, and the respondent was denominated "defendant." That court then reversed and remanded the cause to the District Court as a result of the failure of the trial judge to receive evidence outside of the record, in mitigation or exculpation of the acts of the defendant. *Offutt* v. *United States*, U.S. App. D.C. , 232 F. 2d 69 (1956).

Defendant appealed the action of the Court of Appeals, however, and the United States Supreme Court denied certiorari on June 11, 1956. *Offutt* v. *United States*, 24 U.S.L. Week 3337. A petition for rehearing of that action has been overruled.

**Summary of Evidence**

This case came on for trial on two of the four charges presented in the hearing on the rule to show cause. They were I and III.

> "I. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court. * * *
>
> "III. On several occasions, he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. * * *"

Counsel for the plaintiff, in support of the two charges, offered in evidence and read excerpts from the transcript of the Peckham trial. Plaintiff then rested.

Counsel for defendant, after an opening statement, called eleven witnesses and proffered other witnesses for cross examination whose testimony would have been cumulative. The defendant then rested.

Counsel for the plaintiff then called two rebuttal witnesses who had served as jurors in the Peckham trial, and proffered two more witnesses for cross examination whose testimony was said to be cumulative.

The witnesses called by the defendant were lawyers who had been present in court during part or all of the Peckham trial. They testified as to conduct of the judge and the attorney for the defendant during that trial. They detailed statements and conduct of the trial judge which they thought had provoked the challenged acts and statements of the defendant in this case. They testified that in their opinion the defendant had been respectful and proper. On cross examination some of them admitted that the defendant's conduct at times had "not been exemplary," and that he had been "persistent," but they thought the conduct of the trial judge caused the acts of counsel. One witness referred to the altercations between judge and counsel as a "conflict of personalities." They also said that Offutt had consulted them about the case and they had advised him that it would be necessary for him to state for the record the grounds for his objections to conduct of the judge, and Offutt himself testified that that was why he made statements in open court regarding the judge.

The two witnesses called in rebuttal said that Offutt had disobeyed orders and directions of the judge, and that in their opinion such conduct was the occasion of the apparent friction between judge and counsel. They

admitted that at times the judge had shown anger by facial expression, tone of voice and gesticulations, but they thought such anger had been provoked by trial counsel.

### Effect of Evidence

Except for the testimony of the defendant Offutt, the oral evidence does not vary the record of the Peckham trial or the impressions created by a reading of the transcript. The testimony of defendant Offutt disclaims evil or contumacious intent. It tells why Offutt did the things now charged or cited as contumacious, and what the basis or reason was for certain questions alleged to have "no foundation."

A consideration of all the oral testimony confirms the effect created by a mere reading of the transcript and record of the Peckham case. After giving due regard to the testimony of Offutt regarding his intention, purpose, and the factual basis of his conduct, the question remains, Does his conduct as revealed by the record constitute contempt of court?

### Analysis of Former Decisions

In answering that question, this Court is at once confronted by the decisions and opinions of the Court of Appeals and of the Supreme Court, cited by counsel on both sides of this case. The Court of Appeals reversed the conviction in the Peckham case because of conduct of the trial judge which it concluded "demonstrated a bias and lack of impartiality." In determining the first appeal of Offutt from the finding of contempt, the Court of Appeals said that the petitioner's conduct could not "be considered apart from that of the trial judge," and reduced the sentence because of the conduct of the trial judge which they had mentioned when reversing the conviction in the Peckham case.

The majority opinion of the Supreme Court states that the whole record amply supports this characterization of the conduct of the trial judge by the Court of Appeals. Because of the attitude of the trial judge in the Peckham case, they remanded the contempt proceedings for retrial in the District Court by a judge other than the judge who presided at the Peckham trial.

On the other hand, counsel for the prosecution called this Court's attention to the fact that the Court of Appeals in its first opinion had affirmed the finding on four of the charges of contempt. The Court of Appeals in that case considered the improper conduct of the judge as grounds for mitigation, but the court did not absolve the petitioner Offutt from all wrong doing.

The Supreme Court in the majority opinion said, "Nor are we unmindful of the fact that the ultimate finding of reprehensible conduct by the petitioner was sustained by the Court of Appeals" * * * and further: "We are not intimating that the Court of Appeals was not justified in finding ample support for its conclusion that the trial judge was warranted in deeming petitioner's conduct as such contemptuous."

The Supreme Court reversed the conviction because it concluded that the accused should have had a trial before a different judge. Three of the Justices dissented, saying that they would affirm the judgment of the Court of Appeals, and one of the dissenting judges said, "This case goes back to the District Court for hearing by another judge on charges as to which, on the record, this court admits petitioner is guilty. It is only a question of how much punishment he shall receive."

### Analysis of Evidence and Law

This Court ordinarily has no authority and no occasion to pronounce judgment on the work or conduct of another

judge of this court. The last mandate from the Court of Appeals, however, ordered a retrial and consideration of such evidence as might be offered in addition to the record of the Peckham trial, for the purpose of showing the conduct and circumstances of such trial and what effect, if any, the conduct of the trial judge had on the challenged conduct of trial counsel. Having considered all the evidence in accordance with the mandate, this Court is confronted by three questions:

(1) Did the conduct of the trial judge in the Peckham case justify, excuse or exculpate counsel for conduct alleged to be contumacious (and so found to be by the reviewing courts)?

(2) Did the conduct of the trial judge extenuate, mitigate or ameliorate the conduct of trial counsel, if found to be improper?

(3) If the conduct of trial counsel was not justified or excused by the conduct of the trial judge, what should the sentence of punishment be in view of extenuating circumstances?

(1)

It is the finding and judgment of this Court that the conduct of the trial judge did not justify or excuse the challenged conduct of trial counsel. It is the opinion of this Court that improper conduct of a trial judge can never justify or excuse contemptuous conduct of a trial attorney. It is, of course, the duty of a lawyer to protect the rights of his client, but vigorous advocacy should never extend to contempt of court. He is obliged at times to state for the record the reasons for his motions or objections, but that should be done decorously in accordance with the rules of trial practice. If denied by the trial judge an opportunity to state his reasons or objections, he should rest content that an appellate court

will consider his proffer and allow him to state his reasons and objections on appeal.

One of the witnesses called by the defendant testified that he had told Offutt that he should be respectful whatever the conduct of the judge. The reason for this strict rule is that the trial judge represents the sovereignty of the law and government. If the man who is counsel meets the man who is judge on the street, in the market place, or on the playing field, they are governed by the same rules of conduct that apply to other men, and they stand on equal footing. When in court, however, the judge, even in spite of human frailties, still is the representative of the sovereign power, and counsel must always respect the office whatever his opinion of the incumbent. Two wrongs do not make a right, and misconduct can not obliterate other misconduct. It is the duty of all participants in a trial to maintain the dignity and good order of the courtroom. The practical requirements of orderly procedure also support this rule.

Rules of Parlimentary Practice and Roberts' Rules of Order, which govern assemblies and meetings forbid further argument after an issue is settled, and one who speaks on a determined issue is out of order. So the rules of trial practice, which govern a more formal procedure, forbid any argument after the court has ruled on a motion, an objection or other issue. Counsel should not again address the court regarding such a settled matter without leave first obtained. Even if all the criticisms and accusations against the judge's conduct should, for purposes of argument, be admitted, still in this case, as in all such cases, there came a time when counsel should have been silent. He should have trusted that his silence would plead his cause on appeal. Further contention or argument became not only futile, but improper.

This rule is supported not only by decisions and practice, but is based on a fundamental p ciple of life which has been exemplified by the great trials of history. Such trials demonstrate the wisdom of silence when furth contention is futile. With magnificent equanimity and submission, Socrates accepted the death sentence of the popular court of Athens, and when his friends arranged the means for his escape from prison, he declined to take advantage of such arrangements, saying that it was the duty of a citizen to obey the law even when its sentence is unjust.

Jesus of Nazareth stood mute before Pilate, in spite of insults and scourgings. When He saw that Pilate feared the Emperor and was determined to please the people who cried for crucifixion, Jesus kept silent, and His silence redounds to His glory.

Sir Thomas More's farewell to his judges is another magnificent example of the transcendency of meekness over injustice. Chief Justice Coke himself set an example for lawyers when he was called to account before the king. When the king persisted in the assertion of his arbitrary will, Coke appropriately replied, "It would not become me further to argue with your Majesty."

A modern exemplification of this principle is found in a book just recently published, entitled "In Silence I Speak: The Story of Cardinal Mindszenty," written by George N. Shuster, President of Hunter College. The author says: "Today the Cardinal's silent martyrdom is more eloquent than all the political cliches that try to compromise with totalitarian ideology." The author concludes: "Americans must believe in something nobler than themselves if they desire the rest of the world to believe in it, too."

So members of the legal profession must believe in the ideals of their profession more than in themselves

if the sovereignty of law is to be respected. This fundamental principle of life was stated by Gerard Groote, one of the most learned men of the 14th Century, in these words: "By patience and humility we become stronger than all our enemies."

Judicial impropriety can not be considered a complete defense, but only an extenuating circumstance.

(2)

When a vigorously contested trial, lasting more than fourteen days, develops personal animosity and acrimonious language, it is almost as impossible to determine the definitive cause and comparative responsibility for each impropriety as it is to unscramble eggs. The trial of this case, however, did develop facts and circumstances which this Court has to consider. It raised questions on which this Court should announce its ruling. Charge No. III will be considered first.

**Charge No. III**

The essence of the charge is that the defendant asked highly prejudicial questions for which there was no foundation. During this trial it was conceded by counsel that the word "foundation" should be considered in two parts: Foundation in fact, and foundation in law.

The evidence revealed that the defendant had some information of facts which would supply a foundation for the questions asked. For instance, he had been informed that the prosecuting witness in the Peckham trial had been taken by police officers to Police Headquarters for questioning. He thought that information indicated an arrest, and the broad definition of arrest supports his interpretation. A more diligent investigation would have revealed that there had been no arrest of the witness in the sense which his question implied. He was not

legally justified in asking the witness WHEN she was first arrested. If warranted at all, the question should have been, Were you arrested? The rules of evidence and the law of the District of Columbia prohibit such a question for the purpose of impeaching the credibility of the witness. A witness's credibility can be impeached only by evidence of conviction of crime. 3 WIGMORE, Sec. 980a; D. C. Code § 14—305; *Sandford* v. *United States*, 69 U.S. App D.C. 44, 98 F. 2d 325. The defendant contended that he was not asking the question for the purpose of impeachment, but to support his contention that the abortion charged against Doctor Peckham had in fact been committed by the prosecuting witness herself, and that she had been promised immunity from prosecution. This Court doubts the legal propriety of such question in the circumstances, but there is authority for questions of that character. WIGMORE, Sec. 967; *People* v. *Simard*, 314 Mich. 624, 23 N.W. 2d 106 (1946). The Court is of opinion, however, that the asking of such a question in the circumstances did not itself constitute contempt.

As to the questions regarding prior abortions, the evidence revealed that factual information had been obtained by defense counsel from doctors and hospital records to support the question. This Court is of opinion, however, that such questions were not proper in law. Doctor Peckham was being tried for an abortion committed in 1952. Questions regarding abortions committed in 1947 or 1950 were irrelevant. But here again this Court cannot find that such irrelevant questions in and of themselves constituted contempt. This Court doubts whether any charge of contempt would have been made if such questions were the only basis for it. They were no doubt cited along with other charges to show the defendant's general attitude. It is the finding and judgment of the Court that the questions asked had foundation in fact, but some of them lacked foundation in law.

**Charge No. I**

Charge No. I alleges that on numerous occasions the defendant made insolent, insulting and offensive remarks to the Court, and was guilty of gross discourtesy to the Court. In support of this charge, counsel for plaintiff cited forty-six excerpts from the transcript of the Peckham case, and offered the evidence of certain jurors. The defendant contended that what he said was true, and that he said it in order to make a record as required by *Billeci* v. *United States*, 87 U.S. App. D.C. 274 (12), 184 F. 2d 394, and in order to comply with the advice given him by counsel whom he had consulted. Advice of counsel is not a defense to a charge of contempt. Counsel for defendant stated that such evidence tended to show zeal for client rather than insolent or offensive attitude toward the court.

Defendant contended further that he was justified in making the statements in the manner they were made by a well-established practice in this court of making such statements during a bench conference, and by the fact that the judge had refused his request for a bench conference and had ordered him to make his statements and objections in open court (Transcript of June 5, page 51 (616)).

It is this Court's opinion that such statements of objections and reasons should always be made to the reporter in a voice audible to the judge, but not to the jury. When making objections to the judge's facial expressions, gestures, and statements, counsel should have approached the reporter and made them in a low voice. If the Court would not permit such presentation, counsel should have rested content that the record would show his proffer. *Butler* v. *United States*, 88 U.S. App. D.C. 140 (9), 188 F. 2d 24. To make such statements in open court and then bandy words with the court as to the truth and propriety of his statements was grossly improper.

Consideration of the excerpts of the transcript and the testimony and arguments brings this Court to the conclusion that the inciting cause of the asperity and improprieties in the Peekham trial was what may be appropriately and simply termed "back talk." Webster's Dictionary defines "back talk" as "impudent or argumentative reply, especially from a junior or a subordinate." The transcript is weighted with retorts which come within that definition (See Findings of Fact). Counsel also asked impertinent and improper questions of the court, and disputed the word of the judge, and frequently repeated derogatory assertions. Such conduct, together with counsel's failure to comply with orders of the court, such as directions to return to counsel table and be silent, reveal an attitude toward the presiding judge which cannot be tolerated or condoned, if orderly trial practice and the dignity of judicial administration is to be preserved. Such conduct of counsel is contempt per se. Neither ignorance, nor advice of counsel, nor zeal for client, can alter the contumacious character of such conduct.

Contempt usually occurs when self-assertion predominates over respect for authority. There is no place for selfishness or pride in the service of the law. A great lawyer said two thousand years ago, "The law is a voiceless magistrate, and a magistrate is the voice of the law." Since the law is impersonal, there should be no personal feeling in the practice and administration of the law. A man is never more upright in mind and heart than when he genuflects before the Supreme Authority. A lawyer is never more honorable and respectable than when he is humble before the law. Humility forestalls humiliation.

It is the finding and the judgment of this Court that the defendant is beyond all doubt guilty of contempt of court. That brings us to the third question.

(3)

As to the sentence to be imposed, the Court is mindful that the Court of Appeals, after reviewing the record of the Peckham case and the record of the first contempt trial, reduced the sentence of ten days custody, imposed by the trial court, to a sentence of forty-eight hours in the custody of the Marshal. A consideration of all the evidence offered in this last trial induces the conclusion that a sentence committing the defendant to the custody of the Marshal for forty-eight hours is just and proper in this case. The sentence of this Court will, therefore, be that the defendant be committed to the custody of the United States Marshal for forty-eight hours, and that execution of the sentence begin at 10 o'clock A.M. on October 13, 1956.

Findings of fact and conclusions of law have been filed as a supplement to this opinion.

R. N. WILKIN
*U. S. District Judge*

Washington, D. C.,
October 11, 1956.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 13572

DORSEY K. OFFUTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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Appeal from the United States District Court for the District of Columbia

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Decided June 17, 1957

*Mr. Warren E. Magee*, with whom *Miss Charlotte Maskey* was on the brief, for appellant.

*Mr. Harold H. Greene*, Assistant United States Attorney, for appellee. *Messrs. Oliver Gasch*, United States Attorney, *Edward P. Troxell*, Principal Assistant United States Attorney, *Lewis Carroll*, Assistant United States Attorney, and *Donald E. Bilger*, Assistant United States Attorney at the time brief was filed, were on the brief for appellee.

Before EDGERTON, *Chief Judge*, and BAZELON and FAHY, *Circuit Judges*.

PER CURIAM: The case is here for the third time. We cite in the margin references to its prior history in the Supreme Court and in this Court.[1] On the last trial, the subject of the present appeal, appellant was convicted of contempt of court upon the charge that, during the trial of *United States* v. *Peckham*, reported on appeal at 93 U.S.

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[1] *Offutt* v. *United States*, 93 U.S. App. D.C. 148, 208 F.2d 842, *reversed*, *Offutt* v. *United States*, 348 U.S. 11; 98 U.S. App. D.C. 69, 232 F.2d 69, *cert. denied* 351 U.S. 988.

App. D.C. 136, 210 F.2d 693, "on numerous occasions he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court." We hold that the evidence supports the conviction upon this charge and that the validity of the conviction is not impaired by error. Appellant was also convicted upon the charge that on several occasions he asked questions of witnesses during said *Peckham* trial that were highly prejudicial to the witness and as to which there was no foundation. We hold that the evidence does not support, with the required freedom from doubt, a conviction of criminal contempt upon this charge.

The District Court sentenced appellant to be committed to the custody of the United States Marshal for 48 hours. Considering the history of the case as a whole and our present reversal of the conviction upon one of the charges, as above stated, we think the sentence should be reduced to commitment to the custody of the United States Marshal for 6 hours.[2]

The case will be remanded to the District Court with directions to modify the judgment so that the adjudication of guilt is limited to the charge contained in paragraph numbered I in the order to show cause and so that the sentence is reduced to commitment to the custody of the United States Marshal for six hours instead of for forty-eight hours.

*Judgment, as so modified, affirmed.*

[2] See *United States* v. *United Mine Workers of America*, 330 U.S. 258, 304-305; *Rosenfeld* v. *United States*, 167 F.2d 222, 223.